IN THE

Supreme Court of the United States

October Term 1939

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA,
Appellee.

APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLEE.

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INDEX.

TABLE OF CASES.

DIGESTS AND STATUTES.

TEXTS.

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OPINIONS BELOW.

The first appeal was taken only by the State of Minnesota. State v. Illinois Central Railroad Company, 200 Minn. 583, 274 N. W. 828, affirmed in part and reversed in part with directions. Rehearing denied, 275 N. W. 854.

The second appeal was taken by the Illinois Central Railroad, 205 Minn. 1; 284 N. W. 360. There the state only appealed on the matter of the allowance of interest and penalty. Affirmed as to both appeals. The third appeal, by the company, resulted in affirmance of the judgment against it for $28,157.95. 205 Minn. 621, 286 N. W. 359.

STATEMENT OF CASE.

This action relates to the inclusion under the railroad gross earnings tax law, Mason's Minnesota Statutes of 1927, Sections 2246 to 2249 inclusive, of the Minnesota proportion of the credit balances from car rental receipts of appellant railway company but not reported by it for the years 1922 to 1929, inclusive, and claimed by the state to be part of its gross earnings and to be treated as such for taxation purposes.

Freight cars pass out of the control and possession of the owning carriers and are hauled by and over the lines of other carriers. Thus the owners are deprived of their use for weeks and months at a time.

To adjust their rights among themselves, the railway companies adopted a practice sanctioned by the Interstate Commerce Commission, by which the owner of the cars diverted to the use of some other carrier is credited and the user is charged with an aggregate amount of one dollar per day per car during such time as such cars are out of the possession of the railroad owning such cars. Accounts are kept and charges adjusted under an agreement between the various railroads on the basis of which the number of days each freight car owned by one railroad is in the possession of another and balancing between the

railroads their respective per diem debits and credits, offsetting car-day for car-day on a reciprocal basis. Where any car account between two railroads balances, there is no payment of money, but any excess of car days in favor of either road is settled on the basis of one dollar per car per day.

It is these moneys or credits so received by appellant for car rentals, so far as they reflect Minnesota operations, that were sought to be taxed by this action.

The method of taxing railroad property by the so-called gross earnings tax began in Minnesota while it was yet a territory. Prior to 1908 car rental credit balances, such as there were, had not been considered as gross earnings, but in State v. M. & I. Ry. Co., 106 Minn. 176, 118 N. W. 679, 1007, in speaking on this subject for the first time, and where only a Minnesota intrastate road was concerned, the court said:

> "Where accounts are kept between different companies and charges are adjusted for such service, up to the point where the accounts balance, the operation is a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies *is one of its sources of revenue earned by its rolling stock*, and should be included in the gross earnings." (Italics ours.)

Thereafter reports of such income were required and became a basis for fixing the tax, to which the railroads all agreed until the decision in State v. Great Northern Ry. Co., 163 Minn. 88, decided in 1925, in which action the gross earnings tax for the year 1922 so far as it related to car rentals was contested.

Railroad companies can get the actual figures showing the periods of time when a foreign car is on their line, but they contend it would be expensive (R. 47); so in order to accommodate them the state has consented to the computation of its proportionate share of the taxable credit balances on the basis of a formula, although at all times the state has been and now is ready and willing to accept actual figures.

From the time of the decision in State v. M. & I. Ry. Co., supra, decided in 1908 and until the year 1921, all railroads operating in Minnesota paid a gross earnings tax on the Minnesota proportion of any car rental credit balance. This balance was determined during such period by placing in one account all receipts and disbursements from all railroads, whether operating in Minnesota or not, and if said account carried as stated showed a credit balance, then there was apportioned to Minnesota that amount or percentage thereof that reflected the ratio or percentage that the Minnesota loaded car miles or revenue car miles bore to the loaded car miles of the entire system of the tax-reporting railroad. This method of determining the gross earnings tax upon car rental receipts or income was agreed to, complied with, and apparently satisfactory to all parties involved until contested in State v. Great Northern Ry. Co., supra. The holding there, and so far as now pertinent, was to the effect that railroads were not required to place in such car rental account any receipts or disbursements received from or made to railroads not physically operating in the State of Minnesota. Following the decision in State v. Great Northern Ry. Co., supra, there was uncertainty as to the proper method of calculat-

ing or computing the proper proportion of credit balances allocable to Minnesota from interstate carriers who physically operated a portion of their road in Minnesota.

In 1933 suit was commenced by the state against several railroads to collect gross earnings taxes upon credit balances. Among such railroads was the Chicago, Burlington and Quincy Railroad. These suits were settled, and during the settlement thereof the so-called "Burlington formula" was devised for the purpose of calculating the Minnesota proportion of credit balances. Subsequent to the commencement of the aforementioned suits, but prior to their settlement, suit had been commenced against the appellant herein. At the first trial the court adopted neither the method of calculation of the state nor the one suggested by the defendant Illinois Central but devised one of its own, based chiefly upon an average percentage of the Minnesota proportion.

About that time the settlement with the other railroads was made upon the basis of the "Burlington formula", and the state in this case in a motion for amended findings asked the court to adopt the "Burlington formula". This the court refused to do, and the case went to the Minnesota Supreme Court on the state's appeal only. The case was remanded back to the trial court for the application of the "Burlington formula," which was applied and the additional tax without certain interest or penalty was awarded the state.

This decision was then appealed by the Illinois Central Railroad and also by the state, but by the latter only on the question of certain interest and penalty. The decision of the trial court was affirmed, and the case was again

remanded to the trial court for the formal entry of judgment, and a third appeal was taken therefrom by the Illinois Central Railroad; and the judgment was affirmed by the state Supreme Court.

SUMMARY OF ARGUMENT.

I. The appellant railroad company may not in this appeal challenge the taxability of credit balances for the following reasons:

A. It acquiesced in the inclusion of said credit balances for gross earnings tax purposes, since 1908, which is tantamount to a practical construction of the statute and is the construction given it by the state and the courts.

B. Question not sufficiently raised by the pleadings.

C. If raised by the pleadings, it was not considered or adopted by the court or the parties as the theory of the case.

D. 1. Such a defense was abandoned when the railroad company failed to appeal after the first trial.

2. By failure to urge such a defense in its assignment of errors when it appealed from the court's decision after the second trial.

E. Question not properly raised by the assignment of errors in the appeal to this court.

U. S. v. Burlington, etc. R. R. Co., 98 U. S. 334, 342;

U. S. v. Hammers, 221 U. S. 220, 225;

Schell's Executors v. Fauche, 138 U. S. 562, 572;

Storaasli v. Minn., 283 U. S. 57;
Millsaps College v. City of Jackson, 275 U. S. 129;
Georgia Casualty Co. v. Waldman, 53 Fed. (2) 24;
Johnston v. Ouachita, etc., 40 Fed. (2) 604;
United, etc. v. West, 280 U. S. 234;
Boston, etc. v. Bjornquist, 248 U. S. 573;
Dunnell's Minn. Digest, Section 401;
4 C. J. S., Section 241, page 465;
Decennial Digest, Appeal and Error, Sections 173 (3), 1082 (9), 852, 882;
Steward v. Nutrena Feed Mills, 186 Minn. 606, 244 N. W. 813;
Illinois Central v. Egan, 203 Fed. 937, 122 C. C. A. 239;
4 C. J. S., Section 701, page 2608; Section 241, page 465; Section 241 (e), page 479;
Duignan v. U. S., 274 U. S. 195, 200;
Montana Ry. Co. v. Warren, 137 U. S. 348;
West v. Rutledge, etc., 244 U. S. 90, 100;
Southern Ry. Co. v. Kentucky, 274 U. S. 91;
City, etc. v. Denver Union Water Co., 246 U. S. 178;
Johnson v. Langford, et al., 245 U. S. 541;
St. Paul, etc. v. Kaufman, etc., 303 U. S. 653.

II. Credit balances or the amount received by a railroad company operating in Minnesota for the use of its freight cars in excess of what it pays for the use of

cars of other companies' cars operating in Minnesota is properly included in taxable gross earnings.

State v. M. & I. Ry. Co., 106 Minn. 176;
State v. McFetridge, 64 Wis. 130, 24 N. W. 140;
State v. Great Northern Ry. Co., 163 Minn. 88, 203 N. W. 453;
Great Northern Ry. Co. v. Minn., 278 U. S. 503, 506;
Cudahy Packing Co. v. Minn., 246 U. S. 450, 452;
Maine v. Grand Trunk Ry. Co., 142 U. S. 217;
Wis. etc. v. Powers, 191 U. S. 379;
Flint v. Stone Tracy Co., 220 U. S. 107;
Postal Telegraph Cable Co. v. Adams, 155 U. S. 698;
Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18;
Galveston, etc. v. Texas, 210 U. S. 217;
State v. N. Pacific Ry. Co., 32 Minn. 294, 20 N. W. 234;
State v. St. Paul Union Depot, 42 Minn. 142, 43 N. W. 840;
Hopkins v. So. Cal. Telephone Co., 275 U. S. 393;
Wallace v. Hines, 253 U. S. 66, 69;
Dane v. Jackson, 256 U. S. 589, 598;
Rowley, etc. v. Chicago N. W. Ry. Co., 293 U. S. 102;
State R. R. Tax Case, 92 U. S. 575;
Giozza v. Tiernan, 148 U. S. 657;
American Sugar Refining Co. v. Louisiana, 179 U. S. 89;
Maxwell, etc. v. Bugbee, etc., 250 U. S. 525;

Branson, etc. v. Bush, etc., 251 U. S. 182;
So. Ry. Co. v. Watts, 260 U. S. 519, 529;
Bell's Gap R. R. Co. v. Penna., 134 U. S. 232;
Merchants & Mfg. Bank v. Penna., 167 U. S. 461;
Magoun v. Ill. Trust and Savings Bank, 170 U. S. 283;
Beers v. Glynn, etc., 211 U. S. 477;
Northwestern, etc. v. Wis., 247 U. S. 132;
Carmichael v. Southern, etc., 300 U. S. 644.

III. The "Burlington formula" for computing the state's proportion of credit balances from the interchange of freight cars is, for all practical purposes, the fairest and most accurate, and does not impinge upon the limitation of the federal constitution.

Wallace v. Hines, 253 U. S. 66, 69;
Union Tank Line Co. v. Wright, 249 U. S. 275, 283;
Great Northern Ry. Co. v. Weeks, 297 U. S. 135;
Commonwealth v. Harrisburg, 284 Penna. 175, 130 Atl. 412;
Ft. Smith Lumber Co. v. Ark., 251 U. S. 533;
Davidson v. New Orleans, 96 U. S. 97;
St. Louis, etc. v. Ark., 235 U. S. 350;
Cream of Wheat Co. v. Grand Forks, 253 U. S. 325;
Citizens National Bank v. Durr, 257 U. S. 99;
St. Louis S. W. Ry. Co. v. Ark., 235 U. S. 350;
Hawke v. Smith, 253 U. S. 225;
Shaffer v. Carter, 252 U. S. 37;

Rowley, etc. v. Chicago N. W. Ry. Co., 293 U. S. 102;

Dane v. Jackson, 256 U. S. 589;

Hans Rees' Sons v. N. Carolina, 283 U. S. 123;

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 699.

IV. The taxing power of a state is not waived by the nonpayment of either all or part of the tax through mistake of a taxpayer or those charged with the collection of the tax.

Winona, etc. v. Minn., 40 Minn. 512, 41 N. W. 465, 159 U. S. 526;

League v. Texas, 184 U. S. 156;

Kentucky Union Co. v. Kentucky, 219 U. S. 140;

Citizens National Bank v. Kentucky, etc., 217 U. S. 443;

Fla. etc. v. Reynolds, 183 U. S. 471;

Ft. Smith Lumber Co. v. Ark., 251 U. S. 532;

White River Lumber Co. v. Ark., 279 U. S. 692.

V. A. "Statute of any state" under Section 237 of the Judicial Code does not include a method of calculation under a tax formula adopted by an administrative agency of a state, and should only be reviewable by the United States Supreme Court in the exercise of its discretion under a writ of certiorari, rather than as a matter of right by appeal.

Fallbrook, etc. v. Bradley, 164 U. S. 112;

Tracy v. Ginzberg, 205 U. S. 170;

Judicial Code, Section 237.

ARGUMENT.

I. A PRACTICAL CONSTRUCTION OF THE STATUTE WITH RELATION TO THE TAXABILITY OF CREDIT BALANCES FROM THE EXCHANGE OF FREIGHT CARS HAS RESULTED FROM APPELLANT'S PAYMENT OF AND ACQUIESCENCE THERETO FOR A LONG PERIOD OF TIME, AND THE ISSUE OF THE TAXABILITY OF CREDIT BALANCES, HAS NOT BEEN PROPERLY RAISED FOR REVIEW HERE BY THE PLEADINGS OR THE THEORY OF THE CASE; NOR WAS THE COURT BELOW GIVEN AN OPPORTUNITY TO PASS ON SUCH QUESTION.

A. From 1908 to 1933 appellant was content with the interpretation and construction of the gross earnings statute regarding the taxability of credit balances as announced in State v. M. & I. Ry. Co., 106 Minn. 176, and thereafter approved in State v. Great Northern Ry. Co., 163 Minn. 88, 203 N. W. 453. See its brief, page 23, where appellant admits that it acquiesced in the payment of taxes on credit balances since 1908, but states that it did so because the amount computed was negligible, notwithstanding the fact that it physically operated thirty miles of railroad in the choicest part of Minnesota's farming territory and where the density of railroad traffic is very heavy.

It paid what was believed to be the proper tax on such balances and did not even challenge the decision of the first trial court in this case when it awarded the state $12,866.50.

Acquiescence in the construction given a statute by the government operates in its favor, as against a citizen or taxpayer.

U. S. v. Burlington etc. R. R. Co., 98 U. S. 334, 342
U. S. v. Hammers, 221 U. S. 220, 225

In the case of Schell's Executors v. Fauche, 138 U. S. 562, 572, the court said:

> "In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

While the Supreme Court is not bound by the characterization given to a state law by the state court, nevertheless it will usually lean toward the construction adopted by the state court of last resort.

Storaasli v. Minn., 283 U. S. 57

Great weight will be given to the decisions of a state court regarding questions of taxation under the constitution or laws of its own state.

Millsaps College v. City of Jackson, 275 U. S. 129

B. Appellant's prayer for relief in its answer (R. 8) objects only to the additional taxes claimed by the state during the years in question. The only place where appellant's pleadings could be taken as opposing any tax on credit balances is contained in paragraph 6 of its answer (R. 5), but the allegations therein do not go to the credit balances.

Issues not set up in answer cannot be raised on appeal.

Georgia Casualty Co. v. Waldman, 53 Fed. (2) 24

Johnston v. Ouachita etc., 40 Fed. (2) 604

United etc. v. West, 280 U. S. 234

Even the theory of trial cannot work a broadening of issues made by pleadings.

Boston etc v. Bjornquist, 248 U. S. 573. Petition for writ denied.

C. A careful examination of the record clearly shows that neither of the trial courts nor the parties during the trial considered such a defense as any part of the theory upon which the case was submitted.

The theory upon which a case was tried is controlling on appeal.

Dunnell's Minn. Digest, Section 401; 4 C. J. S. Section 241, page 465

Decennial Digest, Appeal in Error, Sections 852, 882

The rule against shifting position on appeal is applicable to defendant.

Stewart v. Nutrena Feed Mills, 186 Minn. 606, 244 N. W. 813

Illinois Cent. R. Co. v. Egan, 203 Fed. 937, 122 C. C. A. 239; 4 C. J. S., Section 701, page 2608.

Appellant's position with respect to the constitutional questions was definitely stated by counsel at the opening of the second trial when counsel for appellant said to the court: (R. 116):

"We are here today, if the Court please, for the purpose of permitting the defendant to supplement the

record in this case and urging any defense it may have, constitutional or otherwise, to this Burlington formula * * *."

The trial court understood that the theory of the case was limited to the question of formula when he stated (R. 181):

"Here such balances are conclusively presumed income."

When a cause is brought up for appellate review, a party cannot assume an attitude inconsistent with or different from that taken by him at the trial, and the parties are restricted to the theory on which the cause was prosecuted or defended in the court below. 4 C. J. S., Section 241, page 465. Dunnell's Digest, Section 401.

The same rule governs upon a theory of defense where the parties act upon a particular theory of defense or of opposition thereto. Decennial Digest, Appeal and Error, Section 173 (3), Section 1082 (9).

A party is bound in appellate court by the theory pursued below with regard to the relief sought and grounds therefor, especially where it is inconsistent with the theory at trial. 4 C. J. S., Section 241 (e), page 479.

It is only in exceptional cases where questions not pressed or passed upon below will be reviewed, such as grave questions of public policy or to protect fundamental rights, or where the question did not exist or could not be raised below.

Duignan v. U. S., 274 U. S. 195, 200

Montana Ry. Co. v. Warren, 137 U. S. 348

In the case of West v. Rutledge, etc., 244 U. S. 90, 100, the court said:

> "The essential circumstance would seem to be that a review is sought of that which was not decided, not submitted at all or withdrawn from submission and which, if it had been submitted, might have been decided in favor of the appealing party."

D. 1. At the conclusion of the first trial the appellant here (the defendant in the trial court) moved for amended findings (R. 95). An examination of these findings shows that appellant was not challenging the validity of including credit balances for the purpose of gross earnings tax. Its only concern was with the amount. It conceded the taxability of credit balances by asking in a motion for amended findings of fact and conclusions of law that the figures $137.60 be inserted in the conclusions of law in place of the $12,866.50. However, it was apparently satisfied with the amount awarded by the court, as appellant took no appeal but contented itself with merely resisting the state's appeal, as to the formula or method of calculation.

If appellant believed that the state's proportion of credit balances from the inclusion of freight cars should not have been included in gross earnings and was not taxable under any formula or in any amount, it should have appealed after the first trial, and not have first moved to amend findings, so as to allow a portion of them and subsequently not to appeal at all.

2. After the conclusion of the second trial, defendant again moved for amended findings (R. 188), and utterly failed to challenge the taxability of credit balances, but

confined itself to opposition to the "Burlington formula." Appellant's assignment of errors after the second trial also failed to challenge the taxability of credit balances and limited the scope of review of the state court to the question of the additional taxes or the formula. Copy of the assignment of errors used below in appellant's brief in the second appeal case, No. 31791, is attached hereto as Appendix "A." If, by the most remote speculation, the taxability of credit balances should be deemed to have been put in issue by the pleadings, it was never pressed by the appellant nor passed upon by the court and was completely abandoned as a defense or issue by appellant.

E. Appellant's assignment of errors in this court (R. 219) do not sufficiently challenge the taxability of credit balances, but go to the formula for computing the proportion of share allocable to the state. The only place where such an issue could be considered under the assignment of errors in this court is in paragraphs 7 and 8 of the same (R. 220). There the objection seems to be linked to the formula. Here for the first time this issue is dragged in by the coat-tails as a part of the objection to the formula, but if so it may not be raised in this court after having never been in issue in the court below.

> "If the contention made below differs from the contention made here to such a degree that the decision upon one would not necessarily conclude the other, the raising of one below will not permit the raising of the other here, even if the same provision of the Constitution be the basis of both claims."
> So. Ry. Co. v. Kentucky, 274 U. S. 91

A party cannot on appeal set up new grounds of defense not raised and relied upon in the lower court.

United etc. v. West, 280 U. S. 234
City etc. v. Denver Union Water Co., 246 U. S. 178
Johnson v. Langford et al., 245 U. S. 541
St. Paul etc. v. Kaufman etc., 303 U. S. 653

II. UNDER THE STATUTES AND DECIDED CASES, CAR RENTAL CREDIT BALANCES ARE TAXABLE AS GROSS EARNINGS.

In State v. M. & I. Ry. Co., supra, the court followed the view taken by the Supreme Court of Wisconsin in State v. McFetridge, 64 Wis. 130, 24 N. W. 140, and held that all income or earnings "from sources incidental to the transportation business" received by the railway company should be included within the term "gross earnings." The court held that as to State v. St. Paul M. & M. Ry. Co., 30 Minn. 311, 15 N. W. 307, it was not conclusive upon the broader questions not then involved in that decision, and the court went on to state:

> "The operation of a railroad is not necessarily restricted to operating trains upon railway tracks. We believe it to have been the purpose of the legislature to require railroad companies to pay into the state treasury the stated percentage of the amount of earnings received in connection with all operations reasonably within the powers conferred upon them by the corporate *acts*. Such companies are organized and conducted primarily for transportation purposes, but they receive a considerable income from other sources incidental to the transportation business, though not directly from the operation of trains. We believe the

> proper meaning of the act under consideration to be that, when a railroad company is engaged in work reasonably within its charter powers, the receipts from such sources constitute gross earnings in the operation of the railroad. * * *"

Under the foregoing decision credit balances upon all roads operating in Minnesota were taxed. Subsequently the court decided in State v. Great Northern Ry. Co., 163 Minn. 88, 203 N. W. 453, that Minnesota railroads were not required to place in such car rental account any receipts or disbursements received from or made to railroads not physically operating in Minnesota. In this case the court said:

> "'If it is upon an interstate road, only so much of the rental as is properly applicable to Minnesota may be considered.' In other words, the statute directs, if car rentals are to be considered gross earnings, that *the cars must have been used in operations within the state or upon railways running into the state so that the use within the state may be found by apportionment.* This avoids the stigma of double taxation and avoids any appearance at attempts to tax interstate commerce."

The gross earnings tax upon railroads is in lieu of all taxes upon all of their property within the state. The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state.

> Great Northern Ry. Co. v. Minn., 278 U. S. 503, 506
> Cudahy Packing Co. v. Minn., 246 U. S. 450, 452

Credit balances are but one of twenty-six items included in the computation of railroad gross earnings taxes (R.

76A), and as an integral part of the whole railroad property reflect its value, not merely the value of the freight cars but of the whole railroad under the rule applicable to unitary enterprises.

The second trial court, after stating that the question of credit balances was not a matter at issue and that they were conclusively considered income, very aptly stated that to omit such balances would violate the constitutional uniformity and equality requirements, when it said (R. 181):

> "If freight car per diem balances were omitted altogether, then a railroad having no such balance in its favor would have its tax measured by its entire income while a railroad whose freight car per diem balance amounted to one-third or one-half or three-fourths of its gross income would have its tax measured by two-thirds or one-half or one-fourth of its gross income."

A state may measure a tax by receipts which come partly from business of an interstate nature.

Maine v. Grand Trunk Ry. Co., 142 U. S. 217

Wis. v. Powers, 191 U. S. 379

A tax upon a property may be measured in part by income from property not in itself taxable.

Flint v. Stone Tracy Co., 220 U. S. 107.

The right to tax property used in interstate commerce is well settled.

Postal Telegraph Cable Co. v. Adams, 155 U. S. 698

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18

If it is a legitimate attempt to exercise a taxing power of the state and not imposing a burden on interstate commerce, it is not invalid.

Galveston etc. v. Texas, 210 U. S. 217

In the Galveston v. Texas case, supra, Justice Holmes said:

> "'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.'"

The inclusion of credit balances for the purpose of a gross earnings tax is to measure value of the Minnesota property of this appellant as a going concern or unitary enterprise. In order to successfully challenge the tax itself or the formula, appellant would have to show evidence of value. This it has utterly failed to do. Nowhere does the record contain any such evidence. The second trial court said apropos the question of value and the record (R. 182):

> "There is no evidence in the record to which the attention of the Court has been directed or which it has found from which it may be inferred that the resulting total tax for these years is so unrelated to an ad valorem tax as to destroy its character as a lieu tax."

And again (R. 183):

> "The record does not sustain any inference that the resulting tax is not related reasonably to an ad valorem tax or results in a tax discriminatory as to the defendant."

Taxes paid by other railroads mean nothing unless values are shown. Value must be shown to void a tax as arbitrary.

Rowley v. Chicago N. W. Ry. Co., 293 U. S. 102

Undervaluation of property of the same class belonging to others is not discrimination unless it is intentional and systematic.

So. Ry. v. Watts, 260 U. S. 519, 526

The use by other railroads of rolling stock or freight cars is an asset to a railroad company. Where it has cars of its own which are exchanged for an equal number of another company's cars, there is no increment by reason of the exchange accruing to either company; but when one company receives more cars than another, then credit balances from per diem earnings accruing to the company which owns the cars are a part of the income of such company and enhance its value.

It is difficult to believe that the some thirty railroads in Minnesota would have submitted to the inclusion of credit balance items for taxation purposes for more than twenty-five years, and all but one would now be satisfied with it, if any serious question as to its constitutionality existed.

There has been no increase in the gross earnings tax since 1912, while the millage rate for ad valorem purposes on other property has increased from an average of 27 mills to 83 mills. Minnesota is one of the states imposing the least onerous of tax burdens upon railroads. For a discussion of railroad taxation in Minnesota, see Taxation in Minnesota, Blakey.

Counsel have cited certain early Minnesota cases in support of their contention that credit balances in any amount are not taxable.

State v. St. Paul M. & M. Ry. Co., 30 Minn. 311, 15 N. W. 307.

State v. Northern Pacific Ry. Co., 32 Minn. 294, 20 N. W. 234

State v. St. Paul Union Depot Co., 42 Minn. 142, 43 N. W. 840

These cases are not in point with appellant's position. The "St. Paul" case involved an attempt to tax an annual track rental. There the court said:

> "Rental or compensation paid to the company for the right to operate the railroad cannot be called receipts on account of the application of it. The company might not operate its railroad at all, but lease it for a gross sum, in which all the receipts on account of the operation of the railroad would go into the hands of the lessee, and the rent only (which would probably be regulated by the expectancy of net earnings) into the hands of the company."

In the "Northern Pacific" case the court held that revenue from the operation of a leased line was subject to the gross earnings tax.

In the "St Paul" Union Depot" case the state attempted to impose a gross earnings tax on the depot company's revenue, for which it was held not liable inasmuch as all of its revenue was divided among the railroads which owned it, and they in turn paid a gross earnings tax upon it. This case is almost identical with Hopkins v. Southern Cal.

Tel. Co. 275 U. S. 393, which appellant cites in support of its contention. In both of these cases the state attempted to impose another tax upon the property or income of another company which was renting property to the complaining taxpayer. In the instant case the complaining company is objecting to the inclusion of money which it receives for rentals or credit balances from property *it* owns.

Appellant contends that revenue from the use of these cars for hauling freight is taxed in the hands of the other railroad. That is true, but appellant receives earnings from these cars on a per diem basis regardless of whether they are loaded or empty. The income received by the owning company, in this case the appellant, would escape taxation altogether and particularly while the cars are empty, if credit balances were not included.

On page 25 of appellant's brief it admits that credit balances have a relation to value, *if they are figured in a manner to its liking*, so there is no purpose in refuting its claim that the state has admitted through its corporate examiner the contrary (R. 151). Credit balances are either taxable as gross earnings or they are not. It cannot depend upon degree or amount to establish their validity. It is difficult to believe that anyone could contend in one breath that an item is wholly untaxable under any formula and to do so is palpably discriminatory, whimsical, capricious, arbitrary and unreasonable because it bears no relation to value; and then naively admit that if the tax is computed under the formula it suggests so as to produce a negligible tax, there would be no objection to it.

NO IMPORTATION OF VALUE IN TAXATION OF CREDIT BALANCES.

No property belonging to appellant which is not used in the State of Minnesota is taxed under the "Burlington formula," because the factor of allocation is confined to the extent of the use of the cars in Minnesota. The reporting or owning road's Minnesota proportion of its own mileage is irrelevant, as the extent of its mileage does not determine the extent of the use of its rolling stock, as that is used on many other lines which operate in Minnesota. However, it is permissible for a state to look beyond its borders in order to ascertain the value of the property within its borders where the unit rule is applicable, as it is in the matter of railroad systems.

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they would otherwise possess."
>
> Wallace v. Hines, 253 U. S. 66, 69

A state tax law will not be held to conflict with the Fourteenth Amendment unless it is flagrantly and palpably unequal and so discriminatory and arbitrary as to amount to taking property without compensation.

> Dane v. Jackson, 256 U. S. 589, 598

There the court said:

> "* * * the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in pro-

portion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the States for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures. * * *"

Railway valuations are not capable of arithmetical calculation and not governed by any fixed and definite rule.

Rowley etc. v. Chicago N. W. Ry. Co., 293 U. S. 102.

All railroads operating in Minnesota include credit balances among their gross earnings. Some roads have much of their mileage within the state and therefore accumulate a larger Minnesota proportion of credit balances because they are using freight cars of other companies more in Minnesota, while railroads with a small amount of mileage accumulate a smaller Minnesota proportion of debit balances. This is not a defect of the tax or formula but is occasioned entirely by the extent of each particular railroad's operation within the state. It is enough if there is no discrimination within the same class.

Giozza v. Tiernan, 148 U. S. 657

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89

Maxwell etc. v. Bugbee, etc., 250 U. S. 525

Branson etc. v. Bush etc., 251 U. S. 182

So. Ry. Co. v. Watts, 260 U. S. 519

The Fourteenth Amendment does not compel states to adopt an iron rule of equal taxation.

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232

Merchants & Mfg. Bank v. Pennsylvania, 167 U. S. 461

Magoun v. Ill. Trust and Savings Bank, 170 U. S. 283
Beers v. Glynn, etc., 211 U. S. 477
Northwestern etc. v. Wisconsin, 247 U. S. 132
Carmichael v. Southern etc., 300 U. S. 644

The only requirement of uniformity is that it operate the same upon all in any one class.

State R. R. Tax Case, 92 U. S. 575

III. THE BURLINGTON FORMULA FOR COMPUTING THE "STATE'S PROPORTION" OF CREDIT BALANCES FROM THE INTERCHANGE OF FREIGHT CARS IS FOR ALL PRACTICAL PURPOSES THE FAIREST AND MOST ACCURATE AND DOES NOT IMPINGE UPON THE LIMITATIONS OF THE FEDERAL CONSTITUTION.

The appellant and other railroads ever since formulas have been applied to Minnesota car rental operations have maintained that while physically possible to submit actual figures the prohibitive cost of doing so made it impracticable. Under the statutes and decided cases the state would have had no alternative but to accept actual figures had the railroads submitted them. In an effort to be fair and reasonable and cooperate with the railroads the state has applied a formula for the allocation and computation of the Minnesota proportion of the earnings from the hire of freight equipment or the credit balances accruing to the railroads from such interchange of equipment. The data available to the state taxing authorities to calculate the

Minnesota proportion of credit balances were certain definite figures of every railroad, namely

(a) rentals from other lines for use of cars (Column 1, R. 87-94)

(b) payments to other lines for use of cars (Column 2, R. 87-94)

(c) system loaded freight car miles (See (e) below)

(d) Minnesota loaded freight car miles (See (e) below)

(e) Minnesota percentage of loaded freight car miles (Columns 2 and 5, R. 87-94, inclusive). This is the ratio of (d) to (c) above and admittedly correct. Therefore the divisor (c) and the dividend (d) referred to above are likewise admittedly correct.

All the foregoing quantities were capable of accurate ascertainment and correct results were obtainable therefrom.

The taxing authorities were confronted by the problem of collecting a gross earnings tax upon car rental credit balances which reflected "use within the state" and as determined by figures available and the application of a formula which would "afford the nearest known approach to accuracy and to furnish as close as possible a mathematically correct result."

Never at any time was the Minnesota proportion of a gross earnings tax on car rentals measured or ascertained by anything other than the Minnesota percentage. With this in mind the state taxing authorities adopted and applied to the available figures its formula, which has sometimes been described as the "state's formula."

DEFINITIONS.

Definition of terms and explanation of formulas are as follows:

a. "Loaded freight car miles" mean the same thing as "revenue freight car miles" or "net revenue car miles," and are referred to for the purpose of brevity as "mileage."

b. "Minnesota percentage" is the percentage that the total loaded freight car miles in Minnesota bear to the total loaded freight car miles of the entire system of the railroad during any year. (i. g. If the total loaded freight car miles of the entire system was 1,000,000, and 100,000 thereof was in Minnesota, the "Minnesota percentage" would be ten per cent.)

c. "Minnesota proportion" is the result of applying the Minnesota percentage to a given sum or sums.

d. "System" as used herein, means the entire aggregate mileage of any railroad involved.

e. "Car rentals" as used herein means a $1.00 per diem charge for freight cars of the aggregate sum or sums of such per diem charges.

f. "Home car" is a car on the road to which it belongs.

g. "Foreign car" is a car on a road to which it does not belong.

h. "State" or "state taxing authorities" or their "respective equivalents" mean those state officials charged with the computing and collecting the gross earnings tax.

i. "Road" as used herein may mean a railroad, lines, a railway, railway lines, or a carrier.

j. Reference to any road, railroad, railway, railway lines, carrier or lines, unless otherwise specifically indi-

cated, refers only to such as are operating roads within the state of Minnesota.

k. "Using road" is that road which had possession of cars not belonging to it.

FORMULAS.

STATE'S FORMULA.

The state's formula consisted of applying the Minnesota percentage of the using road to the several and separate car rental receipts and disbursements of the appellant with the other roads with which it had car rental relations, then totaling in separate columns, the Minnesota proportion of such receipts and disbursements so arrived at, then striking a balance of such totals, and if a credit balance, imposing a gross earnings tax thereon. This formula was adopted subsequent to the decision in State v. Great Northern Ry. Co., supra, and was the one upon which suit was originally brought in this action. During the first trial appellant urged adoption of a formula which was identical with the formula used by the state prior to the Great Northern decision with the exception of including per diem rentals from railroads not physically operating in Minnesota. However it subsequently abandoned that position and in a motion to again amend its answer set up another formula which it urged the court to adopt. This formula was incorporated in the answer as paragraph XIII and is based upon track mileage (R. 118).

The only change in the state's position has been in the application of the Minnesota percentage of the using line's

freight car miles to the system balance instead of applying it directly to rentals or payments, while the appellant has shifted from a modified version of the state's old formula to a "track mileage" formula.

The "track mileage" formula as a basis of figuring valuation or computation of earnings of any nature has been thoroughly discredited by numerous decisions including those of this court. Track mileage does not take into account density of traffic and numerous other factors.

Wallace v. Hines, 253 U. S. 66, 69;
Union Tank Line Co. v. Wright, 249 U. S. 275, 283;
Great Northern Ry. Co. v. Weeks, 297 U. S. 135.

BURLINGTON FORMULA.

The "Burlington formula" is identical with the state's formula in all respects, except that system balances are struck in the first instance, and then the Minnesota percentage of the using road is applied to such system balances, be they credit or debit of the individual carriers, and not to system receipts and disbursements. In any and every instance, and under any and all circumstances, the Minnesota percentage of the using road is employed in determining the Minnesota proportion of car rental charges.

Appellant objects strenuously to applying the Minnesota percentage of the using road's loaded car miles to credit balances. This contention was most effectively disposed of in Justice Stone's opinion (R. 102) when he said:

> "The application, for present purposes of that percentage (appellant's) to its own net system credit balances is indefensible for the simple reason that it

helps not at all in ascertaining the amount of car rentals earned by defendant's cars in use by other roads in Minnesota. Plainly for that purpose, the factor of allocation must be the extent of the use of the cars in Minnesota. The reporting or owning road's Minnesota proportion of its whole mileage is in consequence irrelevant; and the Minnesota proportion of the using road's determinative."

Appellant further objects to the application of the Minnesota percentage of the using or reporting road's Minnesota proportion of mileage for the computation of debit balances. With reference to that the court said (R. 104):

"What we must somehow determine, as nearly as may be, is the amount of money derived from the use of cars in Minnesota. On that question, what has been paid for such use in other states has no bearing. Hence, in any such computation or formula, defendant should not have credit for the whole of its debit balances. It is entitled only to allowances for the portion of such balances properly chargeable to Minnesota. Defendant is taxable only on rentals for the use in Minnesota of its cars. Therefore, of receipts for allocation to Minnesota, no reductions can properly be made of sums it has paid other lines for use of their cars outside Minnesota."

Appellant is oblivious to anything but the length of its trackage in Minnesota and ignores the large amount of its rolling stock which is used by other roads in Minnesota. It is only natural that railroads with a large mileage in Minnesota use a larger number of other companies' freight cars in Minnesota and therefore have larger debit balances, while roads with a comparatively short mileage with much rolling stock have more of their cars on other companies'

lines, particularly in Minnesota. This may no more be helped than that two manufacturing concerns with approximately the same plant equipment and the same gross earnings could be paying entirely different income taxes by reason of one plant's having a greater cost of operation. Even a comparable track mileage does not mean roads should pay similar or equal taxes.

DOUBLE TAXATION.

Appellant contends that the application of the "Burlington formula" results in double taxation. Double taxation has been defined as follows:

> "So far as double taxation is concerned, it exists only where there is 'the taxation twice by the same taxing power of what was regarded as the same subject,' and, it may be added, the same kind of tax."
>
> Commonwealth v. Harrisburg, 284 Penna. 175, 130 Atl. 412.

The taxability of credit balances as contended for in this action under the "Burlington formula" does not come within this definition in any respect.

The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of the tax, short of confiscation.

Ft. Smith Lumber Co. v. Ark., 251 U. S. 533.

Exemption from double taxation by one and the same state is not guaranteed by the Fourteenth Amendment. Much less is taxation by two states upon identical or close-

ly related property interests falling within the jurisdiction of both forbidden.

Davidson v. New Orleans, 96 U. S. 97;
St. Louis, etc. v. Ark., 235 U. S. 350;
Ft. Smith Lumber Co. v. Ark., 251 U. S. 532;
Cream of Wheat Co. v. Grand Forks, 253 U. S. 325;
Citizens National Bank v. Durr, 257 U. S. 99.

A tax that is not based on an arbitrary discrimination is not objectionable because it is a double or unequal tax.

St. Louis S. W. Ry. Co. v. Ark., 235 U. S. 350;
Hawke v. Smith, 253 U. S. 225.

In the case of Shaffer v. Carter, 252 U. S. 37, the court said:

> "Nor even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the Fourteenth Amendment prevents the States from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions."

ALLOCATION.

Where it is necessary or desirable to resort to a formula, it is not necessary that the calculation result in perfect mathematical exactitude. The formula which for practical purposes is the fairest and approximately the most accurate under the circumstances will be deemed sufficient.

Rowley, etc. v. Chicago N. W. Ry., supra.

It is impossible to devise a system of taxation which will distribute the tax burden perfectly in accord with every circumstance.

Dane v. Jackson, supra.

Allocations need only be arrived at by the exercise of sound judgment based on the facts.

Great Northern Ry. Co. v. Weeks, supra.

Evidence which merely discloses negligible criticisms in allocation of income as are inseparable from the practical administration of a taxing system in which apportionment with mathematical exactness is impossible is not sufficient to invalidate a tax.

Hans Rees' Sons v. No. Carolina, 283 U. S. 123.

A tax within the power of a state will not be overthrown because it works a hardship, particularly in isolated instances.

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 699.

IV. THE TAXING POWER OF A STATE IS NOT WAIVED BY THE NONPAYMENT OF EITHER ALL OR PART OF A TAX THROUGH MISTAKE OF A TAXPAYER OR THOSE CHARGED WITH THE COLLECTION OF THE TAX.

Appellant has sought to bring the application of the "Burlington formula" to its receipts and disbursements on the interchange of freight car equipment within the limitation upon permissible retroactivity placed upon legisla-

tion imposing new tax burdens. The state is not attempting to levy new or additional taxes but only the collection of the proper amount due under legislation which has been in effect for many years. In the case of Winona, etc. v. Minn., 40 Minn. 512, 41 N. W. 465, affirmed in 159 U. S. 526, Justice Mitchell said:

> "The grand fallacy in this argument is in assuming that statutes like the one under consideration are acts authorizing *original* taxation. The tax was a debt or liability which the land owed in the year when it ought to have been assessed. Such statutes are purely remedial in their nature, and only go to confirm pre-existing rights by adding to the means of enforcing existing obligations. And it can hardly be necessary at this day to argue that wherever property has escaped payment of its share of the public burdens it is competent for the legislature to provide for its assessment or reassessment for back years, and for that purpose it may adopt any method which it might have originally adopted for the enforcement of the collection of taxes. There is no difference in principle between a case where property has escaped taxation by reason of its entire omission from the assessment-rolls *and a case where it has escaped by reason of defects in attempted proceedings for the enforcement of the tax.* In either case the debt or liability for its share of the public burdens remains, and it may be ascertained and enforced in any subsequent year; and the owner cannot object to any particular method adopted for that purpose, provided it operates equally and justly. The principle of all the cases is that the taxing power, when acting within its legitimate sphere, is one which knows no stopping-place until it has accomplished the purpose for which it exists, viz., the actual enforcement and collection from every lawful object of taxation of its

> proportionate share of the public burdens; and, if prevented by any obstacles, it may return again and again until, the way being clear, the tax is collected. * * *
>
> "It is elementary that time never runs against the state unless there is an express provision or necessary implication to that effect."

Justice Brewer in his opinion said:

> "For this statute rests on the assumption that generally speaking all property subject to taxation has been reached and aims only to provide for those actions which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; * * *. At any rate, if it did so, it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the supreme court of the state."

However, even if we proceed upon the theory that the element of retroactivity exists, such laws imposing taxes or providing remedies for their assessment and collection and not impairing vested rights are not lacking in due process. A state may adopt new remedies for the collection of taxes and apply such remedies to taxes already delinquent without violating the federal constitution.

League v. Texas, 184 U. S. 156.

Kentucky Union Co. v. Kentucky, 219 U. S. 140.

It is no denial of due process for a state statute to subject to taxation property which has escaped in prior years if an opportunity to question the validity or the amount be given, nor to provide a new remedy for a tax liability imposed by a prior law.

Citizens National Bank v. Kentucky, etc., 217 U. S. 443.

In the instant case there was no new legislation, only the discovery that the proper method for computing credit balances was not being used subsequent to 1922, when the Great Northern case was commenced and the decision therein handed down in 1925. During the pendency of this action all railroads, including appellant, knew that it was highly probable that a new method of calculating gross earnings taxes on the interchange of freight car equipment was possible. The correctness of gross earnings reports cannot be ascertained immediately upon their filing in order to determine the accuracy of the same or whether all earnings have been properly returned. There are about thirty railroads operating as such in the State of Minnesota and the corporate examiner must check the books of the company. Sometimes it is several years before this may be done. Matters which cannot be settled and require litigation require sometimes several years. This case was commenced about five years ago.

There is nothing in the federal constitution which forbids a state from reaching backward and collecting taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials.

Fla. etc. v. Reynolds, 183 U. S. 471;
Fort Smith Lumber Co. v. Ark., 251 U. S. 532;
White River Lumber Co. v. Ark., 279 U. S. 692.

V. A "STATUTE OF ANY STATE" UNDER SECTION 237 OF THE JUDICIAL CODE DOES NOT INCLUDE A METHOD OF CALCULATION UNDER A TAX FORMULA ADOPTED BY AN ADMINISTRATIVE AGENCY OF A STATE, AND SHOULD ONLY BE REVIEWABLE BY THE UNITED STATES SUPREME COURT IN THE EXERCISE OF ITS DISCRETION UNDER A WRIT OF CERTIORARI, RATHER THAN AS A MATTER OF RIGHT BY APPEAL.

It was never intended that the United States Supreme Court should as a result of the Fourteenth Amendment be transformed into a court of appeal where all decisions of state courts involving merely questions of general justice and equitable considerations should be submitted to that court for its determination.

Fallbrook, etc. v. Bradley, 164 U. S. 112;
Tracy v. Ginzberg, 205 U. S. 170.

Questions arising over the interpretation of state laws do not give rise to a federal question, provided that the law as interpreted does not violate due process.

When Congress removed the clause "or an authority exercised under any state" from Section 237 of the Judicial Code, it was clearly its purpose to remove the right to "appeal" to this court from decisions of state courts involving the validity of municipal ordinances, commission orders, and rules adopted by a university, except by writ of certiorari. The meaning of "statute of any state" should be

confined to a statute or law directly passed by the legislature of the state.

The argument and authorities cited in appellee's statement opposing jurisdiction and motion to dismiss are again urged upon the Court for consideration.

CONCLUSION.

1. The appellant may not in this appeal challenge the taxability of credit balances.

2. Credit balances are properly included as taxable gross earnings under the Minnesota statute.

3. The so-called "Burlington formula" for calculating the state's proportion of credit balances from the interchange of freight cars is for all practical purposes the fairest and most accurate and does not violate the federal constitution.

4. The federal constitution does not forbid the collection of back taxes which were omitted through mistake as to the law or the application of a faulty formula.

5. A tax formula is not a "statute of any state" within the meaning of Section 237, Judicial Code.

Respectfully submitted,

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APPENDIX "A"

ASSIGNMENT OF ERRORS.

APPELLANT'S BRIEF.

STATE OF MINNESOTA.

IN SUPREME COURT.

No. 31791

ILLINOIS CENTRAL R. R. CO., APPELLANT.

vs.

STATE OF MINNESOTA, RESPONDENT.

1. The court erred in making the first finding of fact: "That the application of the Burlington formula does not violate the constitutional rights of the defendant."

2. The court erred in its second finding of fact: "That the track mileage formula offered by the defendant is not a better formula than the Burlington formula."

3. The court erred in making its third finding of fact that there is due from defendant for the years in question, in addition to the taxes it paid and in addition to the balance which its Corporation Examiners found to be due after audit, the sum of $26,414.59.

4. The court erred in its conclusion of law that the State of Minnesota is entitled to recover from defendant the sum of $26,414.59, with interest at the rate of 6%, and costs.

5. The court erred in holding that the State of Minnesota can constitutionally collect an additional gross earnings tax for the years in question, 1922-1929, notwithstanding the admitted fact that defendant paid its full tax for those years in accordance with the formula duly and regularly prescribed by the State's Tax Commission under specific statutory authority.

6. The court erred in holding that the State of Minnesota can constitutionally require defendant to pay an additional tax on its gross earnings for said years notwithstanding the payment by defendant of the amount found to be due by the State after a complete audit of defendant's accounts of the amount found by the State to be due certified to the State Auditor and collected by the State Treasurer.

7. The court erred in holding that the Burlington formula is a valid and enforcible formula notwithstanding the admitted fact that:

(a) It was not pleaded;

(b) It was never adopted by the Comptroller with the approval of the Tax Commission;

(c) It wholly exempts from the payment of any tax whatever seventeen of the twenty-five railroads in the State, including those doing the most business and having the largest amount of property and the greatest gross earnings.

8. The court erred in holding that defendant's constitutional rights were not violated by the imposition of the *additional tax* after defendant paid the amount due the State in compliance with the formula prescribed by the State and followed by defendant for the years in question and after payment of the additional amount found to be

due upon audit by the State and in holding that the imposition of *such additional tax* and the construction of the Minnesota statute permitting it

(a) Did not deprive defendant of its property without due process of law;

(b) Did not impair the contract between defendant and the State of Minnesota arising from the payment by defendant of the balance found due by the State Public Accountants after statutory audit of defendant's accounts.

(c) Did not impair defendant's vested rights as guaranteed by both the Minnesota and Federal Constitutions.

(d) Did not violate Section 1 of Article IX of the Minnesota Constitution requiring that all taxes be uniform upon the same class of subjects.

(e) Did not place an unreasonable burden on interstate commerce in violation of Section 1 of Article I of the Constitution of the United States.

(f) Did not deprive defendant of the equal protection of the laws under the Minnesota and Federal Constitutions. (Italics ours.)